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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CASTAWAYS BACKWATER CAFÉ, INC.,

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATIONS DIVISION OF ALCHOLIC BEVERAGES AND TOBACCO; GEOFF LUEBKEMANN, DIRECTOR DIVISION OF HOTELS & RESTAURANTS; JOHN O. AGWUNOBI, SECRETARY OF DEPARTMENT OF HEALTH, STATE OF FLORIDA; PAT PARMER, DIRECTOR, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, STATE OF FLORIDA; SIMONE MARSTILLER, SECRETARY OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATIONS, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eleventh Circuit affirmed the District Courts dismissal with prejudice of Petitioner Amended Complaint seeking injunctive and declaratory relief and asserting that the Florida Clean Indoor Air Act ("FCIAA"), Fla. Stat. § 386.01 *et seq.* was facially unconstitutional because it banned smoking in some indoor workplaces but included an exemption for smoking in "stand alone bars" and certain other areas.

The statute sought to be declared unconstitutional is preambled as the states intent to prevent the employees and patrons of restaurants and other public environments from suffering the effects of second hand smoke. The basis for the law is that second hand smoke results in cancer in certain individuals which results in great expense to the people inflicted and the State of Florida.

The Petitioner claims in its Complaint that the statute as written is illegal because it is laden with exceptions based only on irrational logic because amongst other things, it allows employees at certain places of businesses to suffering the effects of second hand smoke while prohibiting it in other places without a reasonable basis for the exceptions. These exceptions it is alleged are included in the statute for surely economic purposes.

The question therefore is: Does the Florida Clean Indoor Air Act ("FCIAA") as applied to Petitioner's business (restaurant) violate the equal protection clause of the United States Constitution?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Castaways Backwater Café, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the Eleventh Circuit is unpublished as filed on January 23, 2007. The Eleventh Circuit affirmed the opinion and order of the United States District Court, Middle District of Florida, dated August 25, 2006, *see* appendences A and B.

STATEMENT OF JURISDICTION

This Courts jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit opinion was filed on January 23, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

United State Constitution, Amendment XIV

Constitution of the State of Florida § 20, Art. X

Florida Clean Indoor Air Act, ("FCIAA"), Fla. Stat. § 386.201 *et seq.* (The Florida Statute).

Fla. Stat. § 386.203(11)

> "Stand Alone Bar" means any licensed premises devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the servicing of food, if any, is merely incidental to the consumption of such beverages; and

> the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace, including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. A place of business constitutes a stand alone bar in which the service of food is merely incidental in accordance with this subsection if the licensed premises derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

Florida Department of Business and Professional Regulations Emergency Rule, 61 AER03-0, FAC provides,

> SPECIFIC FACTS AND REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: The citizens of the state of Florida voted to amend the Florida constitution and created the Florida Health initiative in s. 20, Art, X of the State Constitution. The Florida legislature passed House Bill 63A (the "Bill") to protect people from the health hazards of second-hand smoke and to implement the constitution amendment. The bill takes effect July, 1 2003, and the Florida legislature authorized the Division of Alcoholic Beverages and Tobacco (the "Division") to adopt emergency rules to carry out the provisions of the Bill.

The relevant provisions of the Florida Clean Indoor Air Act (FCIAA) are lengthy and therefore set out in appendix C.

STATEMENT OF THE CASE

Preliminarily, Castaways submits that this case presents no question concerning the wisdom of the challenged Florida Statute as it pertains to smoking, the propriety of the procedures by which they were adopted, or the right of the State in general to promulgate restrictions on the use of tobacco in public places. The degree of scientific support for the regulations and their unquestionable value in protecting those who choose not to smoke, are likewise not pertinent except as background. Nor does Castaways attempt to make argument concerning the personal freedoms of smokers or their "right" to smoke in a public place, a habit that may inflict serious harm on others who must breathe the same air. However laudable the State's attempt to protect the public is however, the inequities promulgated by the Florida Statute must be reviewed by this Court to give substance to the Equal Protection Clause. As described in more detail below, Castaways submits that the exceptions to the Florida Statute are unconstitutional and in violation of the Equal Protection Clause because they are not based on any rational reason and they are wholly inconsistent with the purposes expressed by the Florida Legislature.

The gravamen of Castaway's claim is the disparity between the stated purpose of the law and its exception which counteract that purpose.

When one considers that stand alone bars that serve food, regardless of the amount, subject their employees, cooks, wait staff, bartenders, hosts, and their non-smoking patrons to second hand smoke, it is easy to realize what a sham such an exemption makes of the intended purpose of the statute.

However, that is not the only flaw. Consider that in areas of Florida, such as Naples, Tampa, Sarasota, Orlando, and Key West, where tourism is rampart, free standing bars generate (30) to (70) thousand dollars gross revenue a week, 10% of these revenues is a substantive amount of food sold in any given week during season. It points out that hundreds of patrons and the large wait staff tend to pass through these establishments; clearly the statute could not have been intended to prevent second hand smoke and yet allow substantial exceptions to the law.

Additionally, smoking is permitted on patios, lanai's, and other areas adjacent to restaurants where there business is predominantly the sale of food, yet these outdoor restaurant areas are similarly exempt from the requirement of the article. Query, is second hand smoke is less lethal to the patron on the outside restaurants area? What protection do the patrons dinning indoors get in Florida where most restaurants are entirely opened to the outside during winter months, the height of tourism? It is respectfully argued none.

It is these disparities that the Petitioner was not permitted to offer evidence of when the lower court dismissed its Complaint.

REASONS FOR GRANTING THE PETITION

Petitioners Amended Complaint alleges facts sufficient to survive a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6). The lower court and the appellate court, by-passed that issue and made their ruling and it appears based on their findings, that as a matter of law that they objected the statute was constitutional. It is therefore argued that by both courts in their rulings prevented the Petitioner from submitting proofs of the fact and the applicable law.

This court has repeatedly held that an alleged infringement of ones constitutional rights, such as the right to equal protection under the law, qualifies as a "direct injury." *Bush v. Vera*, 517 U.S. 957, 957 (1996), noting that a party allegedly denied equal protection because of legislature action has standard to challenge that action.

The State of Florida argument that Petitioner will be "worse off," if it is successful, appears to imply that Castaways wished the court to re-write the statute for its benefit, i.e. to allow smoking in its premises. However, it has been made clear the purpose is merely to have the statute re-written by the legislature for the protection of all Florida residents from the dangers of second hand smoke, and seeks a declaration to the extent permitted by constitutional principles to create a statute that is equally applied to all and not one that makes exceptions for the benefit of a certain few.

The Petitioner submits it has long been held that "the guaranty" of "equal protection of the laws is a pledge of the protection of equal laws." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 353, 541 (1942) and *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1890).

While we believe that the United States Constitution is not a license for courts to judge the wisdom or fairness or logic of legislative choices, except when a statutory classification proceeds along suspect lines and infringes fundamental constitutional rights. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

The Eleventh Circuit finding that there was a rational basis because the distinction drawn between restaurants and stand alone bars could be legitimately based on the "regular presence of children in restaurants," *see* Eleventh Circuit Opinion, page 3, as the legitimate government interests that apparently swayed the lower court and the Eleventh Circuit. It is argued that no where in the statute objected to does it indicate a purpose to primarily protect children, as opposed to all human being. Clearly the mandate of equal protection is to prevent the drawing of distinction between individuals based solely on differences that are irrelevant to legitimate government objectives. *Lofton v. Sec'y of Department of Children and Family Servs*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005), *quoting Lehr v. Robertson*, 463 U.S. 248, 265 (1983). The lower court erred in dismissing Petitioner's Complaint. It is believed that testimony at a trial would have substantiated that bars that serve food even in limited amounts equally pollute the bar with second hand smoke which affects children as well as adults.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 23, 2007

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-15065
Non-Argument Calendar

D.C. Docket No. 05-00273-CV-FTM-29-SPC

CASTAWAYS BACKWATER CAFÉ, INC.,

Plaintiff-Appellant,

versus

STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATIONS DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
GEOFF LUEBKEMANN,
JOHN O. AGWUNOBI,
PAT PARMER,
SIMONE MARSTILLER,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(January 23, 2007)

Appendix A

Before MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Castaways Backwater Café, Inc. ("Castaways") appeals the district court's dismissal with prejudice of its amended complaint seeking injunctive and declaratory relief and asserting that the Florida Clean Indoor Air Act ("FCIAA"), Fla. Stat. § 386.201 *et seq.*, was facially unconstitutional because it banned smoking in most indoor workplaces but included an exemption for smoking in "stand-alone bars."[1] We review a district court's grant of a motion to dismiss *de novo*; and we take as true the facts as alleged in the complaint. *Owens v. Samkle Auto., Inc.*, 425 F.3d 1318, 1320 (11th Cir.2005). After careful review, we affirm.

In the amended complaint, Castaways alleged that the defendants, in their official capacities, had attempted to enforce the FCIAA and thereby prevent Castaways from allowing its patrons to smoke inside of its business premises. Castaways sought a declaration that the FCIAA created an unconstitutional, arbitrary, and capricious classification by distinguishing between restaurants and stand-alone bars and thereby violated the Equal Protection Clause of the U.S.

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1. Castaways sought injunctive and declaratory relief against the Secretary of the Department of Business and Professional Regulations of the State of Florida, Division of Alcoholic Beverages and Tobacco; the Director of the Division of Alcoholic Beverages and Tobacco; the Secretary of the Department of Health of the State of Florida; and the Director of the Division of Hotels and Restaurants of the Department of Business and Professional Regulations of the State of Florida.

Constitution because the classification was not rationally related to a legitimate government purpose.[2] The district court held that the Florida legislature's stated objective in enacting the FCIAA-to protect citizens from the health hazards of second-hand tobacco smoke-satisfied rational-basis review because the distinction drawn between restaurants and stand-alone bars could legitimately be based on the regular presence of children in the former type of establishment but not the latter.

In the instant case, no fundamental constitutional right and no suspect classification is involved. The Equal Protection Clause thus requires only that the challenged classification be rationally related to a legitimate government interest. *See Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir.2004), *cert. denied*, 543 U.S. 1081, 125 S.Ct. 869, 160 L.Ed.2d 825 (2005). "The central mandate of the equal protection guarantee is that '[t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.' " *Id.* at 817 (quoting *Lehr v. Robertson*, 463 U.S. 248, 265, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983)). Here, we readily conclude that the district court did not err in its Equal Protection analysis nor in its conclusion that the Legislature's distinction between restaurants and stand-alone bars is rationally related to the legitimate interest of protecting public health. Accordingly, the court properly dismissed the amended complaint.

AFFIRMED.

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2. Castaways also asserted the FCIAA violated of its substantive due-process, but has not appealed as to that claim.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MEYERS DIVISION FILED AUGUST 25, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MEYERS DIVISION

Case No. 2:05-cv-273-FtM-29SPC

CASTAWAYS BACKWATER CAFÉ, INC.,

Plaintiff,

vs.

SIMONE MARSTILLER, Secretary of the Department of Business and Professional Regulations, Division of Alcoholic Veverages and Tobacco, State of Florida; PAT PARMER, Director, Division of Alcoholic Beverages and Tobacco of the Department of Business & Professional Regulation, State of Florida; JOHN O. AGWUNOBI, Secretary, Dept. Of Health, State of Florida; GEOFF LUEKEMANN, Director, Division of Hotels & Restaurants of the Dept. Of Business & Professional Regulations, State of Florida,

Defendants.

OPINION AND ORDER

This matter comes before the Court on defendants' Motion to Dismiss Amended Complaint (Doc. # 19), to which plaintiff filed a Memorandum in Opposition (Doc. # 22).

Appendix B

Defendants filed supplemental authority (Docs.# 27, # 28, 30), which plaintiff opposed (Doc. # 29).

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in the Amended Complaint as true and take them in the light most favorable to plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005). The Amended Complaint (Doc. # 17) alleges that plaintiff Castaways Backwater Café, Inc. (plaintiff or Castaways) owns and operates a restaurant in Collier County, Florida. Castaways asks the Court to declare the Florida Clean Indoor Air Act (FCIAA), Fla. Stat. § 386.201 *et seq.*, unconstitutional as a violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Amended Complaint names as defendants Simone Marstiller, Pat Parmer, Dr. M. Rony Francois, and Geoff Luebkemann (collectively, "defendants") in their official capacities as State of Florida officials who enforce the FCIAA.

Plaintiff asserts that the defendants are attempting to enforce the FCIAA and prevent plaintiff from allowing its patrons to smoke in its restaurant. The Amended Complaint alleges that the FCIAA is unconstitutional because: (1) It contains exceptions to its no-smoking-in-enclosed-workplaces provision, instead of making the smoking ban universal in its workplace application (Doc. # 17, ¶ XII); (2) some exceptions are based solely on economic considerations, and were enacted to grant special economic privilege to those holding Florida liquor licenses (*Id.*, ¶ IX);

and (3) the exceptions are based on irrational logic, and without any legitimate interest or rational or plausible reasons (*id.*, ¶ ¶ IX, XII). The Amended Complaint asserts that applying the FCIAA to plaintiff's business "is arbitrary, capricious, irrational, violates substantive due process, bears no reasonable relation to public health safety or welfare and is therefore void." (*Id.* at 5.)

II.

In 2002 a citizen initiative sought to amend the Florida Constitution by adding a provision banning tobacco smoking in enclosed workplaces. The proposed text to Section 20, Art. X of the Florida Constitution was:

> **(a) Prohibition.** As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke, tobacco smoking is prohibited in enclosed workplaces.
>
> **(b) Exceptions.** As further explained in the definitions below, tobacco smoking may be permitted . . . in retail tobacco shops, designated smoking guest rooms at hotels or other public lodging establishments; and stand-alone bars.

The citizen initiative included definition of terms, Section 20(c), including "stand-alone bar." The Florida Supreme Court upheld the ballot initiative against a legal challenge, *Advisory Opinion to Atty. Gen. Re: Protect People From the Health Hazards of Second-Hand Smoke*, 814 So.2d 415 (Fla.2002), and in due course the initiative was passed in a

general election. As required by the initiative, Section 20(d), Art. X, Florida Constitution, the Florida legislature enacted a statute to implement this constitutional initiative.

The FCIAA was enacted effective July 1, 2003, to "protect people from the health hazards of secondhand tobacco smoke and to implement the Florida health initiative in § 20, Art. X of the State Constitution." Fla. Stat. § 386.202. After defining terms, Fla. Stat. § 386.203, the FCIAA provides that "[a] person may not smoke in an enclosed indoor workplace, except as otherwise provided in s. 386.2045." Fla. Stat. § 386.204. Section 386.2045(1)-(6) allows tobacco smoking in a(1) private residence (with certain exceptions); (2) retail tobacco shop; (3) designated smoking guest room; (4) stand-alone bar; (5) smoking cessation program, medical or scientific research; and (6) customs smoking room. Of particular relevance to this case is the "stand-alone bar," which is defined as:

> any licensed premises devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace, including any business for which the sale of food or any other product or service is more than an incidental source of gross

> revenue. A place of business constitutes a stand-alone bar in which the service of food is merely incidental in accordance with this subsection if the licensed premised derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

FLA. STAT. § 386.203(11).

III

As a preliminary matter, defendants contend that plaintiff's claim is not ripe because plaintiff cannot show that it has sustained, or is in immediate danger of sustaining, a direct injury as a result of the FCIAA. (Doc. # 19, pp. 1-2.) Moreover, defendants assert that plaintiff currently enjoys the exemptions it challenges, and therefore what plaintiff seeks is essentially an "advisory opinion as to the propriety of indoor smoking under any circumstances." (*Id.* at 2.)

The issue of ripeness raises basic questions of jurisdiction that cannot be waived and goes to the very heart of the "case or controversy" requirement of Article III. *Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health and Rehabilitative Servs.*, 225 F.3d 1208, 1227 n. 14 (11th Cir.2000). "To determine whether a claim is ripe . . . we must examine whether there is sufficient injury to meet Article III's requirement of a case or controversy, and if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete to permit effective decision-making by the court." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315

(11th Cir.2000) (internal quotations and citations omitted). *See also Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir.2005).

The Court finds that this case is ripe for adjudication and that plaintiff alleges sufficient injury in the Amended Complaint to satisfy the case or controversy requirement. The Amended Complaint alleges that defendants "are attempting to enforce" the FCIAA and "to prevent Plaintiff from allowing its patrons to smoke in the premises wherein its business is conducted." (Doc. # 17, pp. 2-3.) The Amended Complaint also alleges that "[i] n order to adapt its business to the statute's requirements, the plaintiff would either lose 90% of its patrons, or apply for a bar license to serve alcohol and discontinue service of food over 10%. Both alternatives will cause Plaintiff serious financial damages and loss of its very valuable business." (*Id.* at 5.) Additionally, enforcement of the FCIAA includes the imposition of monetary civil penalties. Fla. Stat. § 386.207. The Court concludes that these allegations are sufficient to establish, for purposes of a motion to dismiss, that the case is ripe for adjudication.

IV.

The Amended Complaint alleges violations of the Substantive Due Process Clause and the Equal Protection Clause of the United States Constitution. While the parties focus on the equal protection claim, the Court addresses both constitutional issues. For the reasons set forth below, the Court concludes that neither ground states a claim upon which relief may be granted.

Appendix B

A.

The United States Constitution guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The substantive due process component "protects fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.' " *Moore*, 410 F.3d at 1342-43 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Such fundamental rights are "those guaranteed by the Bill of Rights as well as certain 'liberty' and privacy interests implicit in the due process clause and the penumbra of constitutional rights." *Moore*, 410 F.3d at 1343. The special "liberty" interests include "the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* (citation omitted). The Supreme Court has been very reluctant to recognize new fundamental rights. *Id.* (citation omitted).

In analyzing a substantive due process claim, the Court must first craft a careful description of the asserted right. The Court then determines whether the asserted right is one of the fundamental rights and liberties which, viewed objectively, are deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Id.* (citations and quotations omitted).

The Amended Complaint contains the required careful description of the asserted right. The right asserted by plaintiff

is the right of a public restaurant to allow its patrons to smoke in its business premises. (Doc. # 17, ¶ VIII.)

The next question is whether the asserted right to allow patrons to smoke in a public restaurant is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Moore*, 410 F.3d at 1344 (citation omitted). The answer clearly is no. *E.g., City of N. Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla.1995). While tobacco smoking may have a long history, both liberty and justice will continue to exist if smoking in a public restaurant is curtailed or precluded.

Because the FCIAA does not implicate a fundamental right, the Court reviews whether it is "rationally related to legitimate governmental interests." *Moore*, 410 F.3d at 1345. This is a highly deferential standard, and the Court will find a statute unconstitutional in only the most exceptional circumstances. *Id.* The substantive due process analysis at this point dovetails with the equal protection analysis discussed below. For the reasons stated below, the Court finds that the statutory smoking exemptions are rationally related to legitimate government interests, and therefore do not violate plaintiff's substantive due process rights.

B.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction equal protection of the laws." U.S. Const. Amend. XIV, § 1. If a statutory classification

infringes on fundamental rights or concerns a suspect class, the Court will analyze the statute under a strict scrutiny standard. *Moore,* 410 F.3d at 1346. Otherwise, "the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest." *Bah v. City of Atlanta,* 103 F.3d 964, 966 (11th Cir .1997) (citations omitted). Here, as discussed above, there is no fundamental right at stake or unduly burdened. The Court also concludes that no suspect class is involved. Suspect classifications include race, alienage, national origin, gender, and illegitimacy. *Moore,* 410 F.3d at 1346 (citation omitted). The Court finds that smokers are not in a suspect class. Therefore, strict scrutiny is not the applicable standard, and the Court applies the rational basis test. *Id.*

"In a rational basis analysis, the legislative enactment carries a 'strong presumption of validity.' " *Bah,* 103 F.3d at 967 (citing *FCC v. Beach Commc'ns,* 508 U.S. 307, 314 (1993)). Additionally, under the rational basis test the classification need only be rationally related to the achievement of some legitimate government interest. *Beauclerc Lakes Condo. Ass'n v. City of Jacksonville,* 115 F.3d 934, 935 (11th Cir.1997); *Panama City Med. Diagnostic Ltd. v. Williams,* 13 F.3d 1541, 1545 (11th Cir.1994). Application of the rational basis test is a two step process. First, the Court identifies a legitimate government purpose the enacting governmental body could have been pursuing. *Beauclerc Lakes,* 115 F.3d at 935. Second, the Court determines whether a rational basis exists to believe that the legislation would further the hypothesized purpose. *Id.*

Appendix B

Here, the Florida Constitutional amendment identifies the intended government purpose being pursued. The constitutional amendment, and the subsequent enactment of the FCIAA, were intended as a "health initiative to protect people from the health hazards of second-hand tobacco smoke, . . ." Section 20(a), Art. X, Florida Constitution. While there may be other legitimate government interests, the Court need not go beyond the one articulated by the Florida Constitution.

The second issue is whether a rational basis exists to believe that the legislation would further that purpose. "A statute is considered constitutional under the rational basis test when 'there is any reasonably conceivable state of facts that could provide a rational basis for' it." *Moore*, 410 F.3d at 1346 (quoting *Beach Commc'ns*, 508 U.S. at 313). As *Lofton v. Secretary of the Department of Children and Family Services* stated:

> Rational-basis review, a paradigm of judicial restraint, does not provide a license for courts to judge the wisdom, fairness, or logic of legislative choices. The question is simply whether the challenged legislation is rationally related to a legitimate state interest. Under this deferential standard, a legislative classification is accorded a strong presumption of validity, and must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. This holds true even if the law seems unwise or works to the disadvantage of a particular group, or if the

> rationale for it seems tenuous. Moreover, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. Rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.

358 F.3d 804, 817-18 (11th Cir.2004), *cert. denied* 543 U.S. 1081 (2005)(internal quotations and citations omitted). *See also Rodrequez v. United States,* 169 F.3d 1342, 1350 (11th Cir.1999). Courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Heller v. Doe,* 509 U.S. 312, 321 (1993) (citation omitted).

Applying these principles, the statute easily survives constitutional challenge. Plaintiff first argues that the Legislature's consideration of economic factors in its classifications renders the statute void under the Equal Protection Clause. The Equal Protection Clause does not preclude consideration of economic factors. Quite the contrary, "the Supreme Court has clearly held that in cases involving economic classifications, the rational basis test is extremely lenient." *Williams,* 13 F.3d at 1545. The Eleventh Circuit quoted the following from *Beach Communications,* 508 U.S. at 313:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Williams, 13 F.3d at 1545. *See also Georgia Cemetery Ass'n, Inc. v. Cox*, 353 F.3d 1319, 1321 (11th Cir.2003). When regulating economic entities a legislature must necessarily engage in line-drawing, and this "renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Williams*, 13 F.3d at 1346 (quoting *Beach Commc'ns*, 508 U.S. at 308). Thus, the consideration of economic factors by the Florida legislature in constructing the FCIAA does not result in a violation of equal protection guarantees.

Second, plaintiff argues that given the stated health objective of the statute, no classifications are permitted, and it is essentially an all-or-nothing proposition. The Court disagrees. The line-drawing process in which a state legislature properly engages will not be found unconstitutional simply because the entirety of a problem is not addressed in a statute. "Thus, legislatures are not required to address all aspects of a particular problem in one fell swoop." *Williams*, 13 F.3d at 1546. Plaintiff's all-or-none argument has been rejected in other equal protection claims.

E.g., Beauclerc Lakes, 115 F.3d at 935 ("A government is not required to provide sanitation service to all or none; ..."). The Court concludes that the statute does not violate the equal protection clause simply because it does not take an absolute approach to the issue of secondhand smoke.

Finally, plaintiff argues that the statute is unconstitutional because there is no legitimate distinction between its restaurant and a "stand-alone bar" in the context of the stated goal of protecting against the adverse health effects of second-hand smoke. In essence, plaintiff argues that even if classifications are permitted in the context of public health, this particular classification is impermissible. As discussed above, plaintiff must negate all rational bases for this distinction. The Court concludes that plaintiff has not done so. The Florida legislature could legitimately conclude that a restaurant is different from a stand-alone bar. At the very least, given the legal age limits for persons who can be served alcohol, the legislature could conclude that the age of a bar's clientele differs from that of a restaurant, which typically serves both adults and families, including children. Given the undisputed legitimate health care concerns of exposure to second hand smoke by children and young persons, the Florida legislature's line-drawing decision between stand-alone bars and restaurants does not offend equal protection guarantees.

Accordingly, it is now

ORDERED:

Appendix B

1. Defendant's Amended Motion to Dismiss (Doc. # 19) is **GRANTED,** and the Amended Complaint is dismissed with prejudice.

2. The Clerk of the Court shall enter judgment accordingly, terminate all pending deadlines as moot, and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 25th day of August, 2006.

s/ John E. Steele
JOHN E. STEELE
United States District Judge

APPENDIX C — RELEVANT STATUTES

The 2006 Florida Statutes

Chapter 386
Particular Conditions Affecting Public Health

* * *

PART II
INDOOR AIR: TOBACCO SMOKE

* * *

FCIAA Fla. Stat. § 386.201 Popular name.—This part may be cited by the popular name the "Florida Clean Indoor Air Act."

FCIAA Fla. Stat. § 386.202 Legislative intent.—The purpose of this part is to protect people from the health hazards of secondhand tobacco smoke and to implement the Florida health initiative in s. 20, Art. X of the State Constitution. It is the intent of the Legislature to not inhibit, or otherwise obstruct, medical or scientific research or smoking cessation programs approved by the Department of Health.

FCIAA Fla. Stat. § 386.203 Definitions.—As used in this part:

(1) "Commercial" use of a private residence means any time during which the owner, lessee, or other person occupying or controlling the use of the private residence is furnishing in the private residence, or causing or allowing to be furnished

in the private residence, child care, adult care, or health care, or any combination thereof, and receiving or expecting to receive compensation therefor.

(2) "Common area" means a hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, entryway, or conference room in a customs area of an airport terminal under the authority and control of the Bureau of Customs and Border Protection of the United States Department of Homeland Security.

(3) "Department" means the Department of Health.

(4) "Designated smoking guest rooms at public lodging establishments" means the sleeping rooms and directly associated private areas, such as bathrooms, living rooms, and kitchen areas, if any, rented to guests for their exclusive transient occupancy in public lodging establishments, including hotels, motels, resort condominiums, transient apartments, transient lodging establishments, rooming houses, boarding houses, resort dwellings, bed and breakfast inns, and the like; and designated by the person or persons having management authority over such public lodging establishment as rooms in which smoking may be permitted.

(5) "Enclosed indoor workplace" means any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include, without limitation, uncovered openings; screened or otherwise partially covered openings; or open or closed windows, jalousies, doors, or the like. A place is

"predominantly" bounded by physical barriers during any time when both of the following conditions exist:

(a) It is more than 50 percent covered from above by a physical barrier that excludes rain, and

(b) More than 50 percent of the combined surface area of its sides is covered by closed physical barriers. In calculating the percentage of side surface area covered by closed physical barriers, all solid surfaces that block air flow, except railings, must be considered as closed physical barriers. This section applies to all such enclosed indoor workplaces and enclosed parts thereof without regard to whether work is occurring at any given time.

(c) The term does not include any facility owned or leased by and used exclusively for noncommercial activities performed by the members and guests of a membership association, including social gatherings, meetings, dining, and dances, if no person or persons are engaged in work as defined in subsection (12).

(6) "Essential services" means those services that are essential to the maintenance of any enclosed indoor room, including, but not limited to, janitorial services, repairs, or renovations.

(7) "Physical barrier" includes an uncovered opening; a screened or otherwise partially covered opening; or an open or closed window, jalousie, or door.

Appendix C

(8) "Retail tobacco shop" means any enclosed indoor workplace dedicated to or predominantly for the retail sale of tobacco, tobacco products, and accessories for such products, in which the sale of other products or services is merely incidental. Any enclosed indoor workplace of a business that manufactures, imports, or distributes tobacco products or of a tobacco leaf dealer is a business dedicated to or predominantly for the retail sale of tobacco and tobacco products when, as a necessary and integral part of the process of making, manufacturing, importing, or distributing a tobacco product for the eventual retail sale of such tobacco or tobacco product, tobacco is heated, burned, or smoked or a lighted tobacco product is tested.

(9) "Secondhand smoke," also known as environmental tobacco smoke (ETS), means smoke emitted from lighted, smoldering, or burning tobacco when the smoker is not inhaling; smoke emitted at the mouthpiece during puff drawing; and smoke exhaled by the smoker.

(10) "Smoking" means inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.

(11) "Stand-alone bar" means any licensed premises devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not located

within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace, including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. A place of business constitutes a stand-alone bar in which the service of food is merely incidental in accordance with this subsection if the licensed premises derives no more than 10 percent of its gross revenue from the sale of food consumed on the licensed premises.

(12) "Work" means any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part time, whether legally or not. "Work" includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like. The term does not include noncommercial activities performed by members of a membership association.

(13) "Membership association" means a charitable, nonprofit, or veterans' organization that holds a current exemption under s. 501(c)(3), (4), (7), (8), (10), or (19) or s. 501(d) of the Internal Revenue Code.

FCIAA Fla. Stat. § 386.204 Prohibition—A person may not smoke in an enclosed indoor workplace, except as otherwise provided in s. 386.2045.

Appendix C

FCIAA Fla. Stat. § 386.2045 Enclosed indoor workplaces; specific exceptions.—Notwithstanding s. 386.204, tobacco smoking may be permitted in each of the following places:

(1) Private residence.—A private residence whenever it is not being used commercially to provide child care, adult care, or health care, or any combination thereof as defined in s. 386.203(1).

(2) Retail tobacco shop.—An enclosed indoor workplace dedicated to or predominantly for the retail sale of tobacco, tobacco products, and accessories for such products, as defined in s. 386.203(8).

(3) Designated smoking guest room.—A designated smoking guest room at a public lodging establishment as defined in s. 386.203(4).

(4) Stand-alone bar.—A business that meets the definition of a stand-alone bar as defined in s. 386.203(11) and that otherwise complies with all applicable provisions of the Beverage Law and this part.

(5) Smoking cessation program, medical or scientific research.—An enclosed indoor workplace, to the extent that tobacco smoking is an integral part of a smoking cessation program approved by the department, or medical or scientific research conducted therein. Each room in which tobacco smoking is permitted must comply with the signage requirements in s. 386.206.

(6) Customs smoking room.—A customs smoking room in an airport in- transit lounge under the authority and control of the Bureau of Customs and Border Protection of the United States Department of Homeland Security subject to the restrictions contained in s. 386.205.

FCIAA Fla. Stat. § 386.205 Customs smoking rooms.—A customs smoking room may be designated by the person in charge of an airport in-transit lounge under the authority and control of the Bureau of Customs and Border Protection of the United States Department of Homeland Security. A customs smoking room may only be designated in an airport in-transit lounge under the authority and control of the Bureau of Customs and Border Protection of the United States Department of Homeland Security. A customs smoking room may not be designated in an elevator, restroom, or any common area as defined by s. 386.203. Each customs smoking room must conform to the following requirements:

(1) Work, other than essential services defined in s. 386.203(6), must not be performed in the room at any given time.

(2) Tobacco smoking must not be permitted in the room while any essential services are being performed in the room.

(3) Each customs smoking room must be enclosed by physical barriers that are impenetrable by secondhand tobacco smoke and prevent the escape of secondhand tobacco smoke into the enclosed indoor workplace.

(4) Each customs smoking room must exhaust tobacco smoke directly to the outside and away from air intake ducts, and be maintained under negative pressure, with respect to surrounding spaces, sufficient to contain tobacco smoke within the room.

(5) Each customs smoking room must comply with the signage requirements in s. 386.206.

FCIAA Fla. Stat. § 386.206 Posting of signs; requiring policies.—

(1) The proprietor or other person in charge of an enclosed indoor workplace must develop and implement a policy regarding the smoking prohibitions established in this part. The policy may include, but is not limited to, procedures to be taken when the proprietor or other person in charge witnesses or is made aware of a violation of s. 386.204 in the enclosed indoor workplace and must include a policy which prohibits an employee from smoking in the enclosed indoor workplace. In order to increase public awareness, the person in charge of an enclosed indoor workplace may, at his or her discretion, post "NO SMOKING" signs as deemed appropriate.

(2) The person in charge of an airport terminal that includes a designated customs smoking room must conspicuously post, or cause to be posted, signs stating that no smoking is permitted except in the designated customs smoking room located in the customs area of the airport. Each sign posted pursuant to this section must have letters of reasonable size that can be easily read. The color, design, and precise locations at which such signs are posted shall be left to the discretion of the person in charge of the premises.

Appendix C

(3) The proprietor or other person in charge of an enclosed indoor workplace where a smoking cessation program, medical research, or scientific research is conducted or performed must conspicuously post, or cause to be posted, signs stating that smoking is permitted for such purposes in designated areas in the enclosed indoor workplace. Each sign posted pursuant to this section must have letters of reasonable size which can be easily read. The color, design, and precise locations at which such signs are posted shall be left to the discretion of the person in charge of the premises.

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